MOTION FILED
NOV 22 1991

No. 91-502

IN THE

Supreme Court of the United States

October Term 1991

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, PATRICIA M. ECKERT, G. MITCHELL WILK, JOHN B. OHANIAN, DANIEL WM. FESSLER, NORMAN D. SHUMWAY, NEAL J. SHULMAN, and WILLIAM R. SCHULTE,

Petitioners,

v.

FEDERAL EXPRESS CORPORATION,

Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

MOTION OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* WITH BRIEF *AMICUS CURIAE* SUPPORTING PETITION FOR CERTIORARI

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November 22, 1991

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

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The National Association of Regulatory Utility Commissioners (NARUC) hereby respectfully moves for leave to file the

accompanying brief as amicus curiae. The written consent of the Petitioner has been obtained and filed with the Clerk of the Court. The Respondent has not consented.

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States engaged in the economic and safety regulation of carriers and utilities. The mission of the NARUC is to serve the public interest by seeking to improve the quality and effectiveness of public regulation in America.

More specifically, the NARUC contains the State officials charged with the duty of regulating, inter alia, the intrastate rates and services of for-hire transportation companies -- trucks, buses, taxis and railroads -- operating within their respective jurisdictions. These officials have the obligation under State law to assure the establishment and maintenance of

intrastate transportation services as may be required by the public convenience and necessity, and to ensure that such services are safely provided at rates and conditions which are just, reasonable, and nondiscriminatory for all intrastate shippers and receivers.

In this case, the Public Utilities Commission of the State of California (CPUC), a member commission of the NARUC, has asked this Court to review a decision of a divided panel of the United States Court of Appeals for the Ninth Circuit, which held that the CPUC's authority to regulate the intrastate movement of packages by trucks operated by an air cargo company -- Federal Express Corporation -- was preempted by Federal statute. Specifically, the panel majority determined that under section 105 of the Airline Deregulation Act of 1978 (ADA), 49 U.S.C. App. sec. 1305(a) (1988), the Congress had prohibited not only State

regulation of air transportation services, but also all CPUC regulation of intrastate truck transportation by Federal Express. According to the panel majority, because Federal Express's inter and intrastate air services are beyond State regulatory authority, the carrier's intrastate truck service is free from State regulation as well.

The Court of Appeals' erroneous construction of the scope of preemption under the ADA will have serious consequences for the regulatory policies and procedures of each of the NARUC's member commissions that regulate intrastate trucking operations of air express companies like Federal Express. In addition, as Judge Singleton described in dissent below, the panel majority's opinion provides no clear way to determine which services or business activities conducted by an air carrier such as Federal Express are subject to State

regulation, including services far removed from air transportation of packages. Left unreviewed, the decision of the Court below greatly restricts, and indeed could eliminate, State regulation of the licensing and safety aspects of Federal Express's vehicle operations, as well as other aspects of the company's business wholly unrelated to air express service and the preemptive purposes of the Airline Deregulation Act.

Therefore, we believe that the amicus participation of a national organization such as the NARUC, which represents each of the State agencies exercising jurisdiction over intrastate transportation services, is justified in this case. Accordingly, to represent the collective interest of its members in preserving their lawful authority to protect the public interest in safe and fair truck transportation, the NARUC respectfully requests that the accompanying brief be accepted for filing.

Respectfully submitted,

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BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The National Association of Regulatory Utility Commissioners (NARUC) submits this

brief as amicus curiae urging that certiorari be granted due to the substantial harm the decision below will have upon the regulation of intrastate motor carriers by its member State regulatory commissions.

As described in the preceding motion, the NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States, and the governmental agencies of the District of Columbia, Puerto Rico, and the Virgin Islands engaged in the regulation of utilities and carriers. The California Public Utilities Commission (CPUC), Petitioner herein, is a member commission of the NARUC. The individual commissioners of the CPUC, also Petitioners herein, are NARUC members. The mission of the NARUC is to serve the public interest by seeking to improve the quality and effectiveness of public regulation in America.

In the decision for which the CPUC seeks this Court's review, Federal Express Corp. v. Pub. Util. Comm'n of California, a divided panel of the United States Court of Appeals for the Ninth Circuit reversed a decision of the United States District Court for the Northern District of California, which held, inter alia, that the CPUC's authority to regulate intrastate motor carrier service provided by the Federal Express Corporation (Federal Express) was not preempted by section 105 (a)(1) of the Airline Deregulation Act of 1978, as amended, 49 U.S.C. App. sec. 1305 (a)(1) ("the ADA").[1] By its decision, the panel

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[1] The majority and dissenting opinions of the Court of Appeals panel (Petitioners' Appendix A) are reported at 936 F.2d 1075 (9th Cir. 1991). The decision of the District Court on the question of preemption under the ADA (Petitioners' Appendix B) is reported at 716 F. Supp. 1299 (N.D. Cal. 1989). The District Court also held that the CPUC's regulation of Federal Express was permissible under the Commerce Clause. Petitioners' Appendix C, 723 F. Supp. 1379 (N.D. Cal. 1989). Subsequent reference will be made to these decisions, as they appear

majority rejected the District Court's ruling that the ADA did not serve to preempt the CPUC's authority to regulate Federal Express's transportation of packages exclusively by truck between points in the State. Specifically, the panel majority held that because Federal Express is "an air carrier" for purposes of section 105 of the ADA, all of its intrastate trucking operations, including transportation of packages moving entirely by truck, were beyond the State's regulatory authority.

The panel majority's reasoning makes this case important to State regulators for the following reasons: first, this broad construction of the ADA to preempt State regulation of the substantial intrastate trucking operations of an air carrier such as Federal Express will affect each of the State agencies which economically regulate

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in Petitioners' Appendix, in this form: App. at ___. Section 1305(a)(1) of the ADA appears at Petitioners' Appendix D-3.

intrastate trucking; second, by expanding the preemptive provisions of the ADA beyond the actual air transport operations of Federal Express, the panel majority has placed at risk such traditional State regulatory programs as motor carrier safety, licensing, and insurance regulation. Moreover, as noted by the dissent below, the panel majority's reasoning sanctions preemption of State regulation of business activities which are wholly unrelated to air transport operations.

Accordingly, this case raises important questions, which should be addressed by this Court, concerning the scope of State authority over the operations of "air carriers" under section 105 of the ADA. As the National representative of the State regulatory commissions, the NARUC's interest in addressing these issues is strong,

compelling its participation in this case.[2]

SUMMARY OF ARGUMENT

The Court should grant the Petition for Certiorari and review the Ninth Circuit panel majority's opinion due to the National importance of the issue raised by the Petition: the scope of State regulation of non-air transportation services of air carriers in light of the preemptive provisions of the ADA. Left unreviewed by this Court, the panel majority's decision is an open-ended invitation to any company possessing a Federal air carrier certificate to seek to exempt itself from otherwise applicable State regulation of business activities having little or no relationship to the air transport business. Quite

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[2] Consistent with the Court's Rule 37.1, the NARUC will not repeat the discussion and analysis contained in the Petition for Writ of Certiorari. The NARUC supports those arguments.

simply, this is an important issue which should be resolved.

Furthermore, despite the panel majority's stated willingness to protect State regulation of the safety aspects of Federal Express's operations, there is no principled distinction between those matters that the court found to be preempted (rates, rules, and conditions of service), and those not preempted, such as State regulation and enforcement of carrier safety standards or liability insurance requirements. Clearly, by focussing its preemption analysis on such generic matters as State regulation of "terms of service" which "may affect price," the court has provided a rationale for Federal preemption of virtually all State corporate and economic regulation of the operations of "air carriers," including business activities which have little or nothing to do with the provision of passenger or package air transport services.

The NARUC respectfully submits that the panel majority's decision is so sweeping, so disruptive of State regulatory policies and plans, and so erroneous, that this Court must grant the petition for certiorari in order to reverse the decision below and reinstate the decisions of the District Court which upheld State regulation in the public interest.

ARGUMENT

LEFT UNREVIEWED BY THIS COURT, THE PANEL MAJORITY'S CONSTRUCTION OF THE ADA WILL CAUSE UNWARRANTED HARM TO STATE REGULATORY POLICIES AND PROCEDURES

The issue presented by this case is straightforward: does section 105 of the ADA, 49 U.S.C. App. sec. 1305(a)(1), preempt the State of California from regulating Federal Express Corporation's transportation of packages between points in the State entirely by truck? In other words, does the Airline Deregulation Act, which preempts

State regulation of air transportation, also preempt the CPUC's authority to regulate the intrastate motor carrier transportation of goods which never see the inside of an airplane simply because the trucks are operated by "an air carrier"?

As the CPUC's Petition describes, the panel majority's construction of section 1305(a)(1), is wrong -- as a matter of interpreting of the statutory language on its face, or in light of relevant legislative history, or as a matter of practical consequence. Simply stated, once the panel majority conceded that the statute cannot be read literally to preempt all State regulation which affects the business activities of "an air carrier" such as Federal Express (App. at A-4), there can be no principled construction of section 105 of the ADA to cover, and thereby preempt, some (but not all) aspects of State regulation not directly related to an air carrier's

"air transportation."

In its Petition, the CPUC has ably analyzed the errors in the panel majority's legal reasoning, showing that the court below was far too willing to broadly construe a Federal statute to displace the exercise of police powers reserved by the Constitution to the States. The NARUC endorses this analysis, but seeks to address the practical implications of the Court of Appeals' decision.

I. The Panel Majority's Opinion Threatens State Economic Regulation Nationwide

As this Court has long held, "[i]ntra-state transportation is primarily the concern of the state." North Carolina v. United States, 325 U.S. 507, 511 (1945). Accordingly, the construction and application of Federal statutes which may preempt State regulation of "intra-state transportation" must meet "a high standard of certainty," and the "justification for

the 'exercise of federal power must clearly appear.'" Id., citing Florida v. United States, 282 U.S. 194 (1931). While these cases address the authority of the Interstate Commerce Commission to preempt State economic regulation of rail carriers, the principle they contain -- that Federal courts and agencies must not lightly preempt the authority of the States to exercise their inherent police powers to protect the interests of their citizens -- remains an important principle of "our Federalism."[3]

The panel majority appeared to recognize as much when, in analyzing the impact of section 105(a)(1) of the ADA, it purportedly "[took] into account the

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[3] Or as this Court stated more recently, "[t]he critical question in any preemption analysis is whether Congress intended that federal regulation supersede state law." Louisiana Public Service Commission v. FCC, 476 U.S. 355, 369 (1986). "Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law." Id., at 368 (emphasis added).

presumption against preemption." App. at A-4, citing California v. ARC America Corp., 490 U.S. 93 (1989), and West v. Northwest Airlines, 923 F.2d 657 (9th Cir. 1991). Yet, as noted in the dissent below (App. at A-7-A-12), the panel majority has strained to split hairs, has confused regulatory concepts, and has mischaracterized Federal Express's services in order to escape the "plain language of the statute" (App. at A-11), and thereby render meaningless the long-settled presumption against preemption.[4]

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[4] The panel majority's reasoning evinces little understanding of economic, safety, or any kind of regulation. For example, the panel majority characterizes the decision in Air Transport Ass'n v. Public Util. Comm'n, 833 F.2d 200 (9th Cir. 1987), cert. denied, 487 U.S. 1236 (1988) to be about "non-economic regulation." App. at A-5. Yet, that decision, as the panel majority describes it, involved State regulation of "a general rate for the protection of telephone users" -- a quintessential example of economic regulation which relates to the "services of any air carrier."

In similar fashion, the panel majority's belief that it is State "contract

Unless reviewed and reversed by this Court, the practical consequences of the panel majority's failure to properly construe section 105 of the ADA will be dire not only for the State of California, but also for the other States within the Ninth Circuit, and if followed by other courts, potentially all States that economically regulate intrastate motor carrier operations.

According to the most recent information collected by the NARUC, regulatory bodies in 42 States including California economically regulate intrastate for-hire motor carriers.[5] Under the proper

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and tort" law that survives preemption -- and not "economic" regulation -- is inexplicable. App. at A-6. Clearly, California's "principles of tort and contract" implicate Federal Express's "terms of service" as surely as direct CPUC regulation of the company's intrastate truck-only service. Yet, one is preempted, the other not.

[5] National Association of Regulatory Utility Commissioners, 1990 Annual Report on Utility and Carrier Regulation, (Washington,

reading of section 105 (a) of the ADA, none of these States may exercise jurisdiction over the air transportation services of Federal Express, or any other "air carrier" for that matter. However, the panel majority's erroneous construction of the statute goes beyond "air transportation" to preempt State regulation of all economic aspects of the motor carrier operations of any business able to acquire Federal authority to "provide air transportation."

The practical harm the panel majority's construction of the ADA will cause is readily apparent. As the CPUC describes in its Petition at 12-13, an "air carrier" such as Federal Express which is exempt from State regulation will obtain important competitive advantages over its intrastate trucking competitors. As the CPUC notes, it has devoted great time and effort to developing "pro-competitive, flexible and

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D.C., 1991) at 844-5.

adaptive" regulatory policies which seek to promote market-based intrastate truck services with effective safeguards to anticompetitive conduct. Id. at 12. These policies, and similar initiatives in other States, are placed at risk by the panel majority's ruling.[6] Clearly, this open-ended invitation to evade lawful State regulation must be reviewed and reversed by this Court.

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[6] The panel majority's opinion appears to place some limits on the extent to which the motor carrier operations of an air carrier would be exempt from State regulation. Apparently, Federal Express wins its exemption from CPUC regulation only because the company operates an "integrated transportation system" for which its intrastate truck service is "an essential part." App. at A-7. Presumably, an existing intrastate trucking company in California which happened to own an airplane would be unable to obtain Federal air carrier authority and exempt itself from State regulation for its trucking operations. But as the dissent below describes, any "limits" on the panel majority's reasoning are illusory. App. at A-11. Moreover, the NARUC submits that it is hardly the business of the Federal courts to be undertaking a case-by-case review of the facts of "integratedness" and "essentiality" the panel majority proposes.

II. The Panel Majority's Opinion Threatens State Safety and Insurance Regulation

The panel majority makes much of its conclusion that Federal Express has only challenged the CPUC's "economic" regulation: ". . . it is uncontested in this case that the general traffic laws of California and its safety requirements for trucks on its highways apply to Federal Express. . . ." App. at A-5. Later, however, the panel majority provides some insight concerning its definition of "economic" regulations, i.e. regulations which "bear on price" or "relate to the terms on which the air carrier offers its [intrastate trucking] services." App. at A-6. With due respect, the NARUC submits that rather than limiting the scope of its preemptive construction of the ADA to "economic" matters, the panel majority has hopelessly confused matters, and more seriously, raised the clear possibility that State regulations necessary for the protection of the shipping and

traveling public will also be preempted.

A few examples illustrate the difficulties that the panel majority's opinion creates: if a State determined that health or safety conditions in congested urban areas required that certain types of vehicles not make pick-ups or deliveries during certain hours of the day, its regulation would clearly "relate to the terms" on which Federal Express offers its services if Federal Express operated those vehicles covered by the regulation. Federal Express, and all other similarly situated carriers, might well find that this regulation directly affects the services it offers and the prices it is able to charge. Under the panel majority's reasoning, Federal Express could well be exempt from this State health and safety regulation.

Or consider a traditional State cargo requirement that intrastate carriers provide cargo and liability insurance for the

protection of shippers and the traveling public. Required cargo insurance "relates to the terms on which the air carrier offers it services" and presumably would be preempted under the panel majority's reasoning. However, required liability insurance also "determine[s] cost," which in turn "affect[s] the price" charged to the carrier's customer, and therefore would be preempted, or at least suspect, under section 105 of the ADA. Accordingly, the panel majority's reasoning raises a serious question as to whether or not California, or any other State, can require that Federal Express or other air carriers that conduct trucking operations insure their vehicles and their contents.

Similarly, it is not at all apparent from the panel majority's opinion that the CPUC or any other State "economic" regulatory agency can impose filing, registration, or assessment fees on Federal

Express or other air carriers to support State safety enforcement. Again, since such fees would be factored into carrier costs, in turn "affecting price," they too would be suspect.[7]

The problem here is that once the panel majority found that some of Federal Express's non-air transport activities were covered by section 105 preemption, any principled way to limit the scope of such preemption was lost. Clearly, the panel majority's apparent tests -- that the trucking service be "integrated" or "essential" to the air service, or that the State regulation "determine the cost" or

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[7] The dissent below offered additional, perhaps more fanciful, examples of the problems and uncertainties that the panel majority's opinion raises. App. at A-10 The NARUC is concerned not only that carriers such as Federal Express will deliver pizza and flowers free from State regulation, but also that businesses that are not now "air carriers" will become such in order to exempt themselves from State regulation. Such fears are no less far-fetched than the dissent's concerns.

"affect the price" -- raise more questions than they resolve. However, as the dissent notes, "this is an easy case." App. at A-8. Under section 105 of the ADA, Federal Express's transportation of packages which move by air is beyond State regulatory jurisdiction. Intrastate transportation of goods entirely by truck is not. This rule is simple and intelligible. It should be adopted by this Court following the grant of the Petition and subsequent review of the panel majority's opinion.

CONCLUSION

For the reasons herein stated, the NARUC respectfully requests that the CPUC's Petition for Writ of Certiorari be granted.

Respectfully submitted,

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